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In the

Supreme Court of the United States

No. 170 October Term, 1949

Park-In Theatres, Inc.
plaintiff-petitioner

v.

Loew's Drive-In Theatres, Inc.
defendant-respondent

Petitioner's Brief in Reply

to brief filed by respondent in opposition
to Petition for Re-Hearing

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Petitioner's Brief in Reply

to brief filed by respondent in opposition to Petition for Re-Hearing

It becomes necessary to call the Court's attention to several errors in the respondent's brief.

1) Confusion and misuse of the Court's decision[1], is at the top level of the industry (and this is not merely a case of some "lay misunderstanding" or some reporting inaccuracies, as respondent's brief erroneously suggests).

Respondent's brief erroneously suggests that the confusion created in the industry is merely some "lay misunderstanding"[2] as to the decisions of the two courts[3] or merely inaccuracy "attendant upon most reporting of legal decisions",[4] and that it is merely a case of where "one or two writers in trade publications have fallen into the common lay error of thinking that denial of certiorari is an affirmance of the decision below".[5]

The Exhibits contained in the *APPENDIX* to the Petition for Re-Hearing abundantly show however that this is not merely a case of some "lay misunderstanding" or inaccuracies in reporting, but is a clear case of confusion and misuse of the Courts' decisions[1] at the top level of the industry.

Thus, as shown by Appendix-Exhibit 18,[6] on May 18, 1949,[7] *legal counsel* for Theatre Owners of America construed the decisions of the 1st and 9th Circuits as creating "*some confusion * * * in the industry*", and that

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[1] i. e. the decision of the 1st Circuit as to which certiorari is sought, and this Court's order of October 10, 1949 denying petition for writ of certiorari

[2] Respondent's Brief, page 3, lines 12-15, and page 6, lines 11-12

[3] namely the 9th Circuit's decision in *Park-In Theatres, Inc.* v. *M. A. Rogers*, 130 F. 2d 745, and the 1st Circuit's decision in the case at bar, as to which certiorari is sought

[4] Respondent's Brief, page 8, lines 8-10

[5] Respondent's Brief, page 4, lines 9-12

[6] excerpted on page 10e at the back of the Petition for Re-Hearing

[7] which was about 40 days after the decision of the 1st Circuit in the case at bar

while (in industry-counsel's opinion) drive-in theatre operators within the 1st Circuit "may fairly safely decide to withhold further royalty payments at least until an adverse decision, if any, on appeal", yet drive-in theatre operators outside the 1st Circuit should have their attorneys explore the likelihood of certiorari being granted *in the case at bar*, and the probable decision of this Court on the merits *in the case at bar*, before reaching any conclusion to discontinue royalty payments (10e and 11e).

Furthermore, as shown by Appendix-Exhibits 25, 26 and 27, immediately after the denial of certiorari (on October 10, 1949) in the case at bar, *general legal counsel* for, and Board Chairman of the Allied States Association of Motion Picture Exhibitors*

> "hailed the *Supreme Court action* in *refusing* to *review* a lower court dismissal of a patent case involving ramps for drive-in theatres as *tremendously important*" (p. 13e),
>
> and
>
> "upon hearing of the high court action (he) advised members not to pay royalties from here on in, and it is likely that members of Allied will heed his advice" (p. 14e),
>
> and said that
>
> "the *Supreme Court's refusal* to hear the drive-in theatre patent case *clears* that *problem* for exhibitors" (p. 14e),
>
> and said
>
> "that other circuit courts of appeal will follow the decision of the appellate court in Boston" (p. 14e),
>
> and said that
>
> "exhibitors can now go ahead and build drive-in theatres without fear of infringement" (p. 15e).

The same (October 15, 1949) issue of BOXOFFICE (Appendix-Exhibit 26) also says that

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* the all-inclusive nation-wide association of motion picture theatre owners and operators with national headquarters at 729 15th Street, N.W., Washington, D. C.

"Many drive-in theatres have been paying royalties right along to Park-In Theatres, and it is quite possible that they wil drop these payments immediately *on advice of such well-known industry counselors as Abram Myers, Allied States Ass'n board chairman and general counsel.*

"* * * *exhibitor counselors* pointed out, that other circuits will follow the Boston reasoning *as a result of the Supreme Court action*" (p. 14e),

"* * * there are two decisions on Circuit Court records which hold with the Park-In Theatre argument that the drive-in ramp idea is patentable. These decisions were handed down in Philadelphia and San Francisco a number of years ago. *These rulings are still the law in these circuits,* however, *attorneys believe now that the highest court has held with the Boston court,* the circuit courts will follow the same reasoning in any new suits brought by Park-In Theatres." (p. 14e)

Therefore, this is not a case of merely some "lay misunderstanding" but a case where the well-known and accredited legal counsel of the industry have deemed the decisions of the 1st and 9th Circuits (on the same patent) as being in conflict and creating confusion in the industry, and where the same legal counsel have misused this Court's denial of certiorari to represent to the industry that such denial of certiorari is an adjudication of the patent by this Court.

There can be no doubt that the statements in the trade-publications excerpted on pages 13e to 16e are either quotations or reflections of the statements of legal counsel for Allied States Association of Motion Picture Exhibitors, as well as of "*industry-lawyers*"* *generally.*

Therefore, this is *not* a case (as respondent *erroneously* suggests) where

* see Appendix-Exhibit 28 excerpted at 15e

> "one or two writers in trade publications have fallen into the common error of thinking that denial of certiorari is an affirmance of the decision below" (Respondent's Brief, page 4, lines 9-11)

but this is, indeed, a case where the top level of the industry has misused this Court's denial of certiorari and where the decisions of the 1st and 9th Circuits (on the same patent) have created substantial confusion in the industry.

That the decisions of the 1st and 9th Circuits are generally regarded by the industry as being in conflict with each other is further shown by the letters of still other legal counsel representing individual drive-in theatre owners and operators, which letters are *Appendix-Exhibits 30, 35 and 40.*

2) Respondent erroneously suggests double standard for grant of certiorari.

Respondent's opposition to the petition for re-hearing seems to be based largely upon respondent's fallacious theory and contention of a double standard, namely, that this Court has or should have one standard for the granting of certiorari in cases where the infringer is the petitioner and another standard where the patent-owner is the petitioner.

While respondent recognizes that under circumstances like those shown by the Affidavits and Exhibits contained in the *Appendix* to the Petition for Re-Hearing this Court has in the past granted certiorari in patent cases, yet respondent argues that those cases should not be a precedent for the granting of certiorari in the case at bar because in the cases cited as authority it was the infringers or prospective defendants who petitioned for certiorari or filed briefs *amicus curiae* in support of such petition, while in the case at bar it is the patent-owner who is petitioning for certiorari.

Thus respondent tries to distinguish the case at bar[1] from the clearly applicable authorities cited on pages 3-5 of the Petition for Re-Hearing favoring the grant of certiorari, by saying that petitioner's authorities were cases

> "where the patents had been held valid and infringed"

and that it was for this reason that

> "this court relaxed the general rule as to non-conflict cases etc."[2],

and in further support of the so suggested double standard, respondent says:

> "There is no adjudication of validity to give concern to the industry."[3]
>
> "In the present case there has not even been an adjudication of validity to bedevil an industry or any part of an industry."[4]
>
> "The industry is not even faced with an adjudication of validity * * *"[5]
>
> "The industry is not even faced with * * * a prospect of preliminary or other injunction before patent expiration in May 1950."[6]

We respectfully submit that such suggestions of a double standard should be rejected, and certiorari should be granted to determine the validity of the patent here in suit, which determination is considered by the whole industry to be of immediate importance, and affects the convenience of many courts, in circumstances in which not only petitioner but legal counsel to the top level of the industry have viewed the decisions of the 1st and 9th Circuits as being in conflict with each other[7], so far as the industry is concerned.

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[1] on the question whether certiorari should be granted

[2] footnote on page 5 of respondent's Brief

[3] last line of footnote on page 2 of respondent's Brief

[4] respondent's Brief, page 6, lines 1-3

[5] respondent's Brief, page 8, lines 30-31

[6] respondent's Brief, page 8, lines 30-32

[7] such conflict of circuits is, we believe, demonstrated by *Points 1-A, 1-B and 1-C*, on pages 23 to 31 inclusive of Petitioner's Brief (filed herein on July 6, 1949) in support of its Petition for Writ of Certiorari

3) Respondent's suggestion that drive-in theatre of patent in suit is merely "a plot of ground or field" is both erroneous and misleading.

Respondent's brief also attempts to minimize the drive-in theatre of the patent in suit as a

> "plot of ground or field into which customers may drive their cars and, without alighting, view a movie", (Respondent's Brief, page 6, lines 16-18)

whereas the claims[1] of the patent in suit (R.pp. 449-451) are drawn to a specific theatre construction including car-aiming ramps which are *not* incidents of a "plot of ground or field" as respondent's brief belittlingly and erroneously suggests.

Indeed, this erroneous suggestion in respondent's brief is refuted even by the recent[2] *Bulletin*[3] published by the *Drive-In Theatres Owners Association Inc.* (after being advised by respondent's chief counsel, Mr. Holmes[4]) wherein that Association clearly points out that the Hollingshead patent is limited to a certain specific theatre construction which includes, inter alia, *a car-aiming device:*

> "3. Is the Park-In Theatres, Inc. patent (Hollingshead) valid? * * * the association * * * is, through its membership, financially aiding * * * in giving the best defense possible to the suit brought * * * by the Park-In Theatres, Inc. * * * **If your theatre** is ramped, terraced or **has a car aiming device** (or if you plan to have one) then the association is aiding your theatre financially—you should be a member and help pay these expenses,"
>
> "If you are not a member of the special litigation group—join now!"[3]

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[1] analyzed on pages 78-81 of petitioner's Brief (filed July 6, 1949) in support of its Petition for Writ of Certiorari

[2] October 31, 1948

[3] Appendix-Exhibit 15, pages 1 and 2 (excerpted at page 9e)

[4] see Appendix-Exhibit 14, page 1 (excerpted at page 7e)

4) Respondent in error, in saying that there is a question of infringement in the case at bar.

Further typical of the many and repeated errors in respondent's brief in opposition, is the statement contained in the footnote on page 7 of its brief, in which respondent *erroneously* says:

> "There was a *serious* question of infringement involved in the present case, which the appellate court did not find reason to pass upon".

Manifestly, there was *no* question of infringement in the case at bar, either in the trial court or in the appellate court, because on pre-trial conference defendant *admitted infringement* of all claims in issue. Thus, the Amended Complaint

> (after alleging in paragraph 9 thereof that defendant entered into a license-agreement with plaintiff and that defendant built and operated a drive-in theatre under the patent in suit under said license and paid royalties for a while and that thereafter the license was cancelled because of non-payment of royalties),

alleged in paragraph 12 thereof (R.p. 6) that since license-termination defendant was without license and operated its drive-on theatre, and that *defendant's*

> "unlicensed *operation of said drive-in theatre* at Providence, Rhode Island, *constitutes an infringement of the patent here in suit*".

On pre-trial conference defendant withdrew its denial of paragraph 12 of the Amended Complaint, as shown by paragraph 8 of the District Court's Order on Pre-Trial Conference (R.p. 23), wherein that Court said:

> "Defendant has withdrawn its denial of paragraph 12 of the Amended Complaint and therefore *paragraph 12 of the Amended Complaint shall stand as having been admitted.*"

Therefore, contrary to respondent's erroneous suggestion, there was clearly no ("serious" or other) question of infringement involved in the present case.

Indeed, respondent *never* suggested *any* question of infringement to the Court of Appeals, either in its Brief or in its "Defendant's Statement of Points" (R.p. 436).

On the contrary, on page 3 of its Brief in the Court of Appeals, respondent said:

> "Nor does defendant deny that its Providence theatre, as operated prior to and after July 1, 1938, infringes at least some of the Hollingshead claims in issue if those claims are valid."

Hence, the appellate Court could of course "not find reason to pass upon" the (absent) question of infringement.

5) Case at bar is, in effect, a class action.

As shown by the Smith affidavit (at Appx. p. 21a), and as shown by Appendix-Exhibit 14, respondent's counsel are counsel for the Drive-In Theatre Owners Association Inc., and have been counsel for such association for more than a year, not merely in connection with the case of *Park-In Theatres Inc.* v. *George W. Ferguson, et al,* but also in connection with that association's program "to present a common front to any efforts to enforce the patent against members", as admitted on page 7 of respondent's brief, and therefore, for that additional reason, the case at bar is, in effect, a class action, and has been looked upon by the industry as a whole as the test case for the industry, as shown by Appendix-Exhibits 14 to 46[1] and by the Affidavits in the Appendix.

CONCLUSION

It is therefore respectfully submitted that the case at bar is conspicuously one in which, by the standards of this Court,[2] certiorari should be granted.

Respectfully submitted

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[1] in *Park-In* v. *Paramount* (Exh. 46) not only Mr. Holmes but also the president and 17 others presumably members of his client, the Drive-In Theatres Owners Association Inc. filed affidavits in support of defendants' (unsuccessful) motion for summary judgment

[2] as indicated by the authorities cited on pages 3 to 5 of the Petition for Re-Hearing